



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

July 24, 1953

Hon. Bryan F. Russ
County Attorney
Robertson County
Franklin, Texas

Opinion No. S-71

Re: Obligation of taxing units to
pay sheriff's fees for service
of citation in suits against
non-resident delinquent tax-
payers.

Dear Sir:

You request the opinion of this office on three questions
as follows:

"(1) Is the State of Texas, or any taxing unit, re-
quired, in bringing tax suits against non-resident delin-
quent taxpayers, to pay fees for the service of citations
on such non-resident defendants?"

"(2) Could such out of county sheriffs require or
demand of the State of Texas, or any taxing unit, bring-
ing such tax suits, payment, in advance, for their fees in
the service of citations on defendants residing in their
counties before making their official returns thereon to
the court trying such cases?"

"(3) If you should answer the foregoing questions
to the effect that such fees are required to be paid in ad-
vance to such out of county sheriffs, then please advise
what provision is made, or out of what fund, should such
payment be made, and by what authority?"

In this connection you submit the following statement:

"The Commissioners Court of Robertson County,
Texas, joined by the State of Texas, acting by and through
the State Comptroller and Attorney General, entered into
contract with a local attorney for the purpose of collect-
ing taxes due on the delinquent rolls of said county, and
if necessary, to institute and prosecute suits against de-
linquent taxpayers to enforce payment thereof. The at-
torney has instituted suits for that purpose, and in con-
nection with his duty therein it became necessary for him
to have the district clerk to issue and mail citations to

out of county sheriffs to be served on non-resident defendants in such suits. Several of such sheriffs have demanded payment of fees in advance for service of such process before mailing their returns into court. Under the law, and rules promulgated by the Supreme Court, such citations, with returns thereon, must be on file in such courts certain number of days before a defendant is required to appear and answer thereto, or default judgment may be taken. The refusal of such officers to make their returns on such citations without being paid their fees in advance has thwarted the efforts of the State of Texas and other taxing units in obtaining judgments in such tax suits."

The collection of delinquent ad valorem taxes is exclusively statutory except as governed by the Rules of Civil Procedure. The answer to your first and second questions is found in the explicit terms of the statute and the Rules of Civil Procedure. There are certain statutory provisions which must be observed. For example, Article 2072, V.C.S., provides in part as follows:

"No security for costs shall be required of the State or of any incorporated city or town in any action, suit or proceeding, . . ."

Article 7333, V.C.S., dealing specifically with costs in delinquent tax suits, provides as follows:

"In each case such fees shall be taxed as costs against the lands to be sold under judgment for taxes, and paid out of the proceeds of sale of same after the taxes, penalty and interest due therein are paid, and in no case shall the State or county be liable therefor except that where the State or other taxing unit is the successful bidder at the tax sale, all charges due newspapers for the publishing of citations and notices of sheriff's sale shall be paid by the county and State and other taxing units in proportion to taxes adjudicated to each."

This provision of the statute comprehends all the fees set out in Article 7332, including the \$2.50 fee allowed to sheriffs and constables for service of process in counties other than the one in which suit is pending. It is observed that it specifically provides that all fees shall be taxed as costs against the land to be sold under judgment for taxes and is to be paid out of the proceeds of the sale after the taxes, penalty and interest due are paid. The Supreme Court in the case of State v. Moak, 146 Tex. 322, 207 S.W.2d 894 (1948) said:

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"The judgment of the district court improperly taxed the costs of court against the State in violation of Art. 7333, R.S., . . .

". . .

"The attempt, in disregard of this statute, to fix upon the State a liability for these costs was a nullity and may be disregarded."

It would be within the province of the Legislature, if it so desired, to require the sheriff or constable to serve process in delinquent tax suits without the payment of any fee and certainly it is within the province of the Legislature to fix the time and manner of paying such fees taxed as costs to the sheriff or other officers in delinquent tax suits. The sheriff would have no authority to refuse to serve process contrary to the explicit demands of the Legislature such as is embodied in Articles 2072 and 7333, V.C.S., supra.

We direct your attention to Section 1 of Rule 117a of the Rules of Civil Procedure pertaining to citations in delinquent tax suits. This rule is as follows:

"Where any defendant in a tax suit is a resident of the State of Texas and is not subject to citation by publication under subdivision 3 below, the process shall conform substantially to the form hereinafter set out for personal service and shall contain the essential elements and be served and returned and otherwise regulated by the provisions of Rules 99 to 107, inclusive."

It is observed that Rules 99 to 107, inclusive, are expressly made applicable to delinquent tax suits. Rule 105 is comprehended within this provision. It is as follows:

"The officer to whom process is delivered shall indorse thereon the day and hour on which he received it, and shall execute and return the same without delay."
(Emphasis added.)

You are therefore respectfully advised that the sheriff is required to execute and make return of all necessary process in delinquent tax suits without the payment of fees in advance and is relegated to the requirements of the statute as to the time and manner in which his fees may be collected. Therefore, questions one and two submitted by you are answered in the negative. Number three requires no answer.

SUMMARY

A sheriff or constable may not require the payment of fees in advance for executing and returning process in delinquent tax suits. Article 7333, V.C.S., requires such fees to be taxed as costs against the land and paid out of the proceeds of the sale. Under Rule 105 of the Rules of Civil Procedure, the sheriff is required to make return without delay.

Yours very truly,

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